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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1990

NORMAN ARCHER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

October Term, 1980

No. 80-5026

LEON WASSERBERGER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petitions for Writs of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

The respondent, the People of the State of New York, respectfully requests that this Court deny the petitions for writs of certiorari seeking review of the judgments of the Court of Appeals of the State of New York in these cases, dated April 24, 1980.

Statement of the Case

In pursuit of his investigation into corruption in the New York City criminal justice system—an investigation undertaken at the behest of the Knapp Commission* prior to the creation of the office of the Special State Prosecutor —the United States Attorney for the Southern District of New York devised a plan which was intended to ferret out any existent wrongdoing. Specifically, it was decided after careful consideration of viable alternatives, that a scenario would be created whereby an undercover agent, after acting out the precise elements constituting a weapons possession offense, would be arrested for such crime in Queens County by a New York City police officer assigned by the Police Commissioner and acting in cooperation with the federal investigation. The agent's "case" would then be processed in the criminal justice system as would that of any other arrestee in Queens County. The plan was carried out.

After his "arrest", the undercover agent was introduced by a federal informant to petitioner Leon Wasserberger, a Manhattan bailbondsman, and through Wasserberger, to Frank Klein, an experienced criminal attorney practicing in Queens County. Based upon Klein's subsequent representations that an Assistant District Attorney with whom he had consulted had decided that the case would have to be fixed in the grand jury, the undercover agent, with Klein's preparation, and with the carefully considered concurrence of the agent's supervisors, appeared before a Queens County grand jury and was questioned by the pe-

* The Knapp Commission was a Mayoral Commission appointed in the early 1970's and charged with examining allegations of widespread corruption in the New York City Police Department.

titioner Norman Archer, then chief of the Indictment bureau of the Queens County District Attorney's office. The agent, as ordered by the U.S. Attorney, only testified to the precise story created by Klein, and the grand jury, subsequent to Archer's instructions, returned no true bill.

In a federal indictment filed in July, 1972, Archer, Klein and Wasserberger were accused by a grand jury sitting in the Southern District of New York of violating 18 U.S.C. §1952, the Travel Act. The indictment specified that the defendants used interstate telephone facilities in order to effectuate a conspiracy to commit, and did commit, the state crime of bribery, a bribery involving the exchange of a substantial sum of money for an assurance that the Queens County grand jury would not vote to indict the undercover agent for the possession of weapons—the "case" which had been "created" by the federal investigators. On January 29, 1973, the defendants were convicted after a jury trial in the United States District Court for the Southern District of New York and were sentenced to terms of imprisonment on March 14, 1973.

On appeal, the United States Court of Appeals for the the Second Circuit reversed the convictions with instructions to dismiss the indictment in view of its conclusion that a federal crime had not been established (486 F.2d 670 [2nd Cir. 1973]). In so holding, the court took occasion to question the tactics of the federal authorities in arranging the "crime" which later became the subject of the "fix". Such criticism was later muted, however, upon the Government's motion for re-argument where for the first time, the facts underlying the investigation were articulated (see 486 F.2d at 683).

Subsequently, under a state indictment filed in Queens County, Archer, Wasserberger and Klein were charged by an Extraordinary Term Grand Jury with the crimes of conspiracy, bribery, and receiving reward for official misconduct—offenses arising out of the same acts underlying the federal prosecution. Thereafter, a proceeding which had been brought in the Appellate Division, in the nature of prohibition, was dismissed on the merits, the court holding that the pending state prosecution would neither place the defendants in double jeopardy nor violate the statutory provisions of New York Criminal Procedure Law §40.20 (2) (McKinney 1971). In a concurring opinion, it was further indicated that as far as the issue of the investigative technique was concerned, such a proceeding was not an appropriate vehicle for review, and that the matter should best be attended to at the trial level where a record could be made "containing all the essential facts showing the manner in which the events leading to the prosecution of the petitioners were planned and carried out" (48a).* The New York Court of Appeals later affirmed that determination.

Acting pursuant to what he understood to be the Appellate Division's direction, the trial court thereafter conducted a hearing which was concerned with the propriety of the federal investigatory tactics. At the hearing, extensive testimony on the question was taken from the former United States Attorney, the former deputy counsel to the Knapp Commission who had later become a Special Assistant United States Attorney charged with directing the federal effort, and the former Police Commissioner.

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* Numerical References are to petitioner Archer's Appendix.

Briefly stated, the witnesses told of the findings of large scale incidents of corruption in the New York City criminal justice system which had been brought to the attention of the United States Attorney's office by the Knapp Commission, whereupon federal investigative assistance was solicited. It was disclosed to the federal prosecutor at the time that the cooperation of one Detective Robert Leuci, whose credibility had been substantiated by the strength of his revelations, had indicated the need for such a federal undertaking.

Subsequently, after carefully considering all alternative investigative approaches which in the past had been successful, the federal authorities decided to utilize the services of an undercover agent who would be "arrested" for a weapons possession offense* in Queens County—an area upon which compelling allegations of official improprieties had focused. The plan, which called for the case to proceed in the Queens County criminal justice system, was implemented with the approval of the Police Commissioner and the knowledge of the then Chief Judge of the State of New York.

The tactics called for the undercover operatives to specifically act out the "crime" and the "arrest" so that, in effect, all subsequent representations by the police officer involved would be based on actual observations. Although it was the investigators' intention to ascertain whether any "fix" might thereafter be effectuated, it remained their

* A possession offense was decided upon since it involved a minimal amount of persons thereby avoiding the possibility of entrapment, and the fact of weapons avoided the danger inherent in the handling of narcotics.

hope that such opportunities for corruption might not be present. No specific target, certainly not the petitioners, was contemplated.

When the time came where it became apparent that the undercover "defendant", at the behest of the co-conspirators, would need to relate a false story to the grand jury—a scenario not initially contemplated by the investigators—the authorities were placed in the position of deciding whether to proceed. In view of his promise to the Police Commissioner, however, of not restricting the investigation to police officers, and the responsibility to the public of determining whether or not allegations on the part of the chief of the Indictment bureau of the Queens County District Attorney's office were valid, the decision was made by the United States Attorney to go forward, albeit with certain constraints. It was thus directed that only the story created by the then targets be imparted to the grand jurors and that no recording or transmitting take place in the grand jury room.

The witnesses indicated that this was a federal investigation undertaken with the cooperation of city agencies and that since the Queens County District Attorney's office was itself under suspicion, it could not have been notified of the procedures under employment.

The court thereafter denied the motion to dismiss the charges on due process grounds. It was the court's observation, however, that with proper judicial safeguards, such as an investigative technique as that employed herein ". . . under appropriately compelling circumstances comes close to being indispensable in the investigation of corrup-

tion at levels that touch intimately the basic integrity of the criminal justice system."

Petitioner Archer thereafter went to trial* wherein the evidence showed, *inter alia,* that he instructed the grand jury during his presentation of the "case" that the seizure of the weapon had been improper, despite his having earlier told the arresting officer that the gun would be admissible; that he told the grand jury that the "accused's" gun permit had been verified in conformity with the story created by his co-conspirators; and that a subsequent search of petitioner's home gave rise to the discovery of part of the $15,000 which the undercover "defendant" had paid petitioner's co-conspirators for the "Fix".

Petitioner Archer was thereafter convicted of bribe receiving and receiving reward for official misconduct (New York Penal Law, former §§200.10 and 200.25 [McKinney, 1967]), and sentenced to three years' imprisonment,** execution of which sentence has been stayed pending the appellate process.

The Appellate Division subsequently affirmed the judgments amidst petitioners' due process and double jeopardy contentions (*People* v. *Archer,* 68 A.D. 2d 441, 417 N.Y.S.2d 507 [2nd Dept. 1979]), and the Court of Appeals then affirmed on the opinion of the intermediate court (see 49 N.Y.2d 978, —— N.E.2d ——, —— N.Y.S.2d —— [1980]).

* Petitioner Wasserberger pleaded guilty to the charges, and co-defendant Klein, for health reasons, was never tried.

** Petitioner Wasserberger was earlier sentenced to six months' imprisonment.

REASONS FOR DENYING THE WRITS

I

The doctrine of "Dual Sovereignty" remains unfettered and clearly supports the constitutional propriety of petitioners' subsequent state prosecution.

The mainstay of petitioners' initial attack upon the viability of their second prosecution—the first by the State of New York—is that the doctrine of "dual sovereignty" has been eroded by recent decisions of this court, and hence, that their rights against twice being placed in jeopardy have been abridged. Since petitioners' premise is totally devoid of judicial support, and since the New York courts have repeatedly stated that the state prosecution came within one of the enumerated exceptions to the state statutory "some transaction" rule (See New York Criminal Procedure Law, §40.20[2][f][McKinney 1971]; see also *Ashe* v. *Swenson,* 397 U.S. 436, 448-460 [1970], Brennan, J., concurring), the instant petitions raise no cognizable double jeopardy claim which needs to be reviewed by this court.

Indisputably, in *Bartkus* v. *Illinois,* 359 U.S. 121 (1965) and *Abbate* v. *United States,* 359 U.S. 187 (1965), this court, applying the doctrine of dual sovereignty, concluded that successive federal/state or state/federal prosecutions for respective offenses arising out of similar facts are not proscribed by the double jeopardy clause of the Fifth Amendment which was later held applicable to the states by virtue of the Fourteenth Amendment (*Benton* v. *Maryland,* 395 U.S. 784, [1969]). Moreover, the subsequently decided *Benton* case in no way detracted from the import of the *Bartkus/Abbate* rulings, in that the court merely concluded in the later decision that successive state/state prosecutions are likewise constitutionally prohibited.

Indeed, only recently, this court has had occasion to breathe renewed life into the dual sovereignty principle (see *United States* v. *Wheeler*, 435 U.S. 313, 317-318 [1978]) save for those instances where the "separate" sovereigns involved actually possessed inter-dependent or inter-related characteristics (see e.g., *Waller* v. *Florida*, 397 U.S. 387 [1970]). This viewpoint has received universal adherence on the part of other courts which have addressed the precise question (see e.g., *United States* v. *Aleman*, 609 F.2d 298, 309 [8th Cir. 1979]; *United States* v. *Taylor*, 603 F. 2d 732, 734 [8th Cir. 1979], *cert. denied*, 100 S.Ct. 487; *United States* v. *Hayes*, 589 F. 2d 811, 817-818 [5th Cir. 1979], *cert. denied*, 100 S.Ct. 93; *Hutul* v. *United States*, 582 F. 2d 1155, 1157 [7th Cir. 1978], *cert. denied*, 99 S.Ct. 1222; *Turley* v. *Wyrick*, 554 F. 2d 840, 840-841 [5th Cir. 1977], *cert. denied*, 434 U.S. 1033 [1978]; *United States* v. *Jones*, 527 F. 2d 817, 822 [D.C. Cir. 1975]; *Martin* v. *Rose*, 481 F.2d 658 [6th Cir. 1973], *cert. denied*, 414 U.S. 876 [1973]; *People* v. *Abbamonte*, 43 N.Y. 2d 74, 371 N.E.2d 485, 400 N.Y.S. 2d 766 [1977]).

It follows that when subsequent to the reversal of petitioners' federal convictions by the United States Court of Appeals for the Second Circuit (486 F. 2d 670 [2nd Cir. 1973]), the newly created office of the Special State Prosecutor sought an indictment under appropriate New York Penal Law provisions, petitioners were being prosecuted for the first time by an independent sovereign. As a consequence, aside from the lack of state statutory defenses to the fact of such a second prosecution (*Matter of Klein* v. *Murtagh*, 44 A.D. 2d 465, 355 N.Y.S.2d 622 [2nd Dept. 1974], *aff'd*, 34 N.Y. 2d 988, 318 N.E.2d 606, 360 N.Y.S.2d 416 [1974]; New York Criminal Procedure Law §40.20 [2] [f]

[McKinney 1971]), petitioners were also without recourse to the Fifth and Fourteenth Amendments of the United States Constitution (*Bartkus* v. *Illinois, supra*).*

Moreover, to the extent that petitioners question the constitutionality of subparagraph (f) of New York Criminal Procedure Law §40.20 (2), they merely raise anew the same unmeritorious point (see Petition at pp. 35-37)—i.e., that successive prosecutions are not constitutionally sanctioned. Again, however, in light of *Bartkus,* as well as the rulings of the New York courts that notwithstanding the *statutory* rejection of dual sovereignty principles in that State, the Legislature was still free to, and in fact did, provide for instances when successive federal/state prosecutions would be allowed, the question is strictly one of state law involving non-constitutional considerations.** It is therefore not within the office of a petition for a writ of certiorari.

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* Interestingly, since the Second Circuit never held that the evidence was insufficient to support that part of 18 USC §1952 which embodied the state offense of bribe receiving (New York Penal Law former §200.10 [McKinney 1967]), petitioners were never found to have been insufficiently proven guilty of the essential charge *sub judice* (compare to *Burks* v. *United States,* 437 U.S. 1 [1978]). The appeal and reversal in *United States* v. *Archer, vis a vis* the subsequent state prosecution, therefore, is akin to that situation when a defendant appeals a conviction with the judgment being later reversed because of compelling trial errors unrelated to the issue of evidentiary sufficiency, and where a new trial is then ordered. Such a case has never been held to run afoul of the Constitution (see *United States* v. *Ball,* 163 U.S. 662, 672 [1896]).

** Petitioners' equal protection argument with respect to sub-paragraph (f) is likewise unavailing. The New York Legislature undoubtedly rationalized that a defendant *convicted* in federal court but later vindicated on appeal by virtue of a statutory element not indigenous to the parallel state penal provision, should be liable for a separate prosecution under the state statute. On the other hand, a defendant earlier *acquitted* in federal court is in a different footing since there is no way to perceive the precise reason for the jury's verdict—a reason which might be totally unrelated to the fact of the additional federal statutory element.

II

The actions of the government agents, having been found by the courts of New York, subsequent to a hearing, to have been lawful and proper, in no way approached the level of "outrageousness" which would prompt this Court to invoke the "due process" defense expressly reserved in *United States* v. *Russell* (411 U.S. 423) and *Hampton* v. *United States* (425 U.S. 484).

The pre-eminent issue in this case, which has accorded it a degree of notoriety ever since the original determination* of the Second Circuit in *United States* v. *Archer*, 486 F.2d 670 (2nd Cir. 1973), is whether the conduct of the federal investigtors, in creating a "crime" which petitioner Archer was twice convicted of "fixing" in his capacity of Assistant District Attorney in charge of the Indictment Bureau of the Queens County, New York, District Attorney's office, was so offensive to the standards of due process as to mandate dismissal of the underlying charges. Although, concededly, a majority of this court has articulated

* The Second Circuit's decision criticizing the acts of the government was clearly muted upon the United States' petition for reargument when the facts of the investigation were elucidated for the first time (see 486 F.2d at 683, 683 n. 1; see also p. 7a of Petitioner's appendix). Petitioner Archer, however, has elected to omit from his appendix the Circuit Court's further reminations in this regard where in such appendix that court's original opinion *alone* is reproduced. In his argument, he has likewise totally disregarded not only the fact of his offense but the decision of the Appellate Division which was issued upon his appeal from the judgment of conviction herein. In its opinion, that court, addressing itself to the exhaustive facts adduced at the "investigative technique" hearing held prior to trial—*facts not at any time advanced before the Second Circuit upon appeal from the federal judgment of conviction*, concluded that, as now fully developed, the record clearly supports the view that the federal investigators proceeded in good faith and with careful regard for all judicial institutions.

the view that such a defense might be available under uniquely "outrageous" circumstances (see *United States* v. *Russell,* 411 U.S. 423, 431-432 [1973]; *Hampton* v. *United States,* 425 U.S. 484, 495, n. 7 [1976] [Powell, J., concurring]), it will be clear from even a cursory understanding of what would be involved in such an instance that the *Archer* case does not fall within its purview.

A.

In *United States* v. *Russell, supra,* which was concerned with the alleged entrapment of that defendant by the federal agents involved, this court, while holding that such defense is unavailable where the accused's predisposition has been established, asserted that,

> [w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process, *cf. Rochin* v. *California,* 342 U.S. 165 (1952), the instant case is distinctly not of that breed (411 U.S. at 431-432).

Thereafter, in *Hampton* v. *United States, supra,* at least five Justices of the court reasserted that view as articulated by Justice Powell in his concurring opinion. Said Justice Powell:

> I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles (425 U.S. at 493).*

* Justice Powell's reference to *United States* v. *Archer* in this regard, as an example of a non-contraband offense situation which the court has not yet considered in the face of such a due process argument, should be quickly placed in its proper perspective. As

(footnote continued on next page)

Indeed, such a "fundamental fairness" defense (see *United States* v. *Russell, supra,* 411 U.S. at 432, quoting *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234 [1960]) has been recognized in a multitude of cases considered in light of *Russell* and *Hampton* by the various Circuit Courts of Appeals, as involving a pure question of law, which, when appropriately raised, is to be addressed to the judge presiding. See *Wager* v. *Pro,* 603 F.2d 1005 (D.C. Cir. 1979); *United States* v. *Corcione,** 592 F.2d 111 (2nd Cir. 1979), *cert denied,* 99 S. Ct. 1545, 99 S. Ct. 1801; *United States* v. *Burkley,* 591 F.2d 903, 911 (D.C. Cir. 1978), *cert denied,* 440 U.S. 966; *United States* v. *Twigg,*** 588 F.2d 373 (3rd Cir. 1978); *United States* v. *Szycher,* 585 F.2d 443 (10th Cir. 1978); *United States* v. *Perrin,* 580 F.2d 730, 737 (5th Cir. 1978), *cert. denied,* 100 S. Ct. 520; *United States* v. *Prairie,* 572 F.2d 1316 (9th Cir. 1978); *United States* v.

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noted earlier, and as realized by the New York courts, the Second Circuit in *Archer* did not have the benefit of the more elaborate facts later revealed in the "technique" hearing conducted during the course of the subsequent state proceedings. Accordingly, the *Archer* opinion, as originally written by Judge Friendly, provides only a limited picture—if accurate at all—of the governmental constraints that were exercised herein and which are now *sub judice* for the first time. Justice Powell's reference therefore should be realized for what it is: a citation to a case which, unbeknownst to the court deciding it, was depictive of a much more elaborate scenario and hence, a depiction not amounting to a complete picture of the relevant events.

* Judge Mansfield's discussion of *United States* v. *Archer in Corcione* (see 592 F.2d at 115-116), appears to ignore the Second Circuit's own reassessment of that case upon reargument (see 486 F.2d at 683), and was written six months before the Appellate Division, in *People* v. *Archer* (68 A.D. 2d 441, 417 N.Y.S. 2d 507), elucidated the further facts that were adduced at the "technique" hearing upon the state prosecution.

** The *Twigg* case appears to be the only post-*Hampton* decision which actually reversed a judgment of conviction upon pure due process grounds. There, the court predicated its disposition on the fact that the government agents had actually created and nurtured the crimes of which the defendant was convicted.

Johnson, 565 F.2d 179 (1st Cir. 1977), *cert denied,* 434 U.S. 1075; *United States* v. *Leja,* 563 F.2d 244 (6th Cir. 1977), *cert denied,* 434 U.S. 1074; *United States* v. *Garcia,* 562 F.2d 411, 415 (7th Cir. 1977); *United States* v. *Graves,* 556 F.2d 1319 (5th Cir. 1977), *cert denied,* 435 U.S. 923; *United States* v. *Steinberg,* 551 F.2d 510 (2nd Cir. 1977); *United States* v. *Quinn,* 543 F.2d 640, 648 (8th Cir. 1976); *United States* v. *Gonzalez,* 539 F.2d 1238 (9th Cir. 1976); *United States* v. *Smith,* 538 F.2d 1359 (9th Cir. 1976); *United States* v. *Gonzalez-Benitez,* 537 F.2d 1051, 1055 (9th Cir. 1976), *cert denied,* 429 U.S. 923; *United States* v. *Reifsteck,* 535 F.2d 1030, 1034-1035 (8th Cir. 1976); and *United States* v. *Campa,* 474 F. Supp. 507 (S.D. Fla. 1979). *Cf. People* v. *Isaacson,* 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978), which accepted a similar defense, upon appropriately delineated guidelines, under the New York State Constitution.

In assessing the viability of such a due process claim, this court in *Hampton* effectively outlined the focus of attention. As stated by Justice Rhenquist,

> [t]he limitations of the Due Process clause of the Ffth Amendment come into play only when the Government activity in question violates some protected right of the *defendant* (411 U.S. at 490; emphasis in original).

See also *United States* v. *Graves, supra,* at 1325; *United States* v. *Campa, supra,* at 509.

Further, the applicability of such a drastic remedy as dismissal of all charges, even by Justice Powell's analysis, is confined to that "rare" situation when police involvement in crime reaches a "demonstrable level of outrageousness" (see 425 U.S. at 495, n. 7, Powell, J., concurring; *cf.*

Rochin v. *California, supra*). And the defense has been accepted as cognizable only in that situation, aside from where the authorities participate in the *precise* crime of which the accused is guilty, where the defendant was not the one who conceived of and fostered the criminality, but where in fact the investigators have done so on their own initiative (compare *United States* v. *Twigg, supra* to *United States* v. *Leja, supra* and *United States* v. *Smith, supra; cf. Hampton* v. *United States, supra,* 425 U.S. at 482, n. 2, Powell, J., concurring).

B.

By no view, could the "rare" "level of outrageousness" contemplated by Justice Powell be realized under the now fully developed facts in this case (compare *People* v. *Archer,* 68 A.D. 2d 441, 417 N.Y.S. 2d 507 [2nd Dept. 1979] to *United States* v. *Archer,* 486 F.2d 670 [2nd Cir. 1973]).

First of all, even petitioner Archer does not accuse the federal authorities of having perpetrated the *same* crime which he has now twice been convicted of committing (and a crime which he completely ignored throughout the state appellate process and in his petition). Hence, although petitioner has charged the investigators with having committed *inter alia,* perjury and offering false instruments for filing—which, of course, is belied by the evidence adduced at the "technique" hearing herein (4a-6a)—he certainly has not claimed that they committed *bribe receiving.*

The reason is simple. It cannot be disputed, were Archer to have been willing to address the substantive facts of his crime, that he and his confederates conceived of the plan to fix the "case" on their own. To be sure, the evi-

dence adduced at the hearing and the trial conclusively demonstrates that the federal undercover agent only suggested that it would be worth his while were "his case" not to proceed. Thus, only the opportunity was created by the investigators. The fact of a bribe, the amount of the bribe, the grand jury as a vehicle for improperly terminating the case as well as the story to be related to that forum, were all suggested by petitioner Archer and his co-conspirators in furtherance of the conspiracy. Hence, as the Appellate Division found, the government did not manufacture a crime that otherwise would not likely have occurred (9a).

Not unlike in *Russell*, therefore, and aside from any issue of predisposition,*

> [n]or does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed. (411 U.S. at 434).

Cf. United States v. *Twigg, supra.*

Secondly, neither petitioner has pointed to any cognizable right which he possessed that was violated by the federal authorities. For the defense to be invokable in the first instance, that is clearly a pre-requisite (see *Hampton* v. *United States, supra,* 425 U.S. at 490).

To the contrary, here, in the face of far reaching allegations of corruption directly implicating the Queens County

* Both sides agree that no defense of entrapment is cognizable on this record.

District Attorney's office—hence the then* unavailability of any appropriate state prosecutorial agency—and in view of the fact that the Knapp Commission's pre-eminent informant would only work with federal prosecutors, the Commission members had no choice but to request a federal investigation. In this regard, the record of the "technique" hearing clearly demonstrates the depth of the allegations which required prosecutorial attention and with which the United States Attorney was confronted.

In pursuing their mandate, the investigators proceeded with great circumspection and with high regard not only for the rights of potential targets but for the very institutions which they were charged with cleansing. The following, therefore, even for the limited purpose of this petition, must be realized:

1. Left undiscussed by the Circuit Court in *Archer*, was the fact that before the plan was even contemplated, there was conscientious consideration given to other alternatives including the use of an existing defendant or a government informant. For purposes of ensuring subsequent credibility and sufficiently reliable corroboration, however, both options had to be eschewed.

2. Also unknown to Judge Friendly in *Archer* was that the authorities had given very careful consideration to the manner in which the "offense" was to be carried out, i.e., the need for a simple weapons possession offense which would involve a minimum of personnel and misrepresentations as well as the avoidance of narcotics substances, and the need to have the "crime" actually acted out so that the "arresting" officer in swearing out a felony complaint would in fact be re-

* The office of the Special Prosecutor was not created until later.

calling that which literally occurred. The "falsity" of the "charge" alluded to in *Archer* therefore was thus meticulously avoided.

3. As in fact observed upon reconsideration of the *Archer* appeal, the Police Commissioner of the City of New York was completely included in the mechanics of the plan to the point of providing the "arresting" officer. The "lying" to the police which was referred to in the original *Archer* opinion therefore simply did not occur.

4. Specificially unrealized by the *Archer* court was that the only misrepresentation made at the government's inititative to a member of the Judiciary—who, obviously, along with the District Attorney, could not have been informed of the plan, since all were under possible suspicion—was the false pedigree of the "arrestee" who, *without taking any oath*, gave information relevant to his identity as "Salvatore Barone." Also, cash bail was posted in order to further minimize resort to falsification. The identity of the agent who posted the bail was likewise not related under oath.

5. Not at all emphasized by the *Archer* court, and as noted earlier, was that Archer and his cohorts themselves suggested the type of fix and the precise amount of the required money—the agent merely having said that it was worth it to him not to go to court.

6. Unlike the *Archer* court's observations which implied that the government "concocted" the story for the grand jury, it is clear that Archer's co-conspirators upon his behind the scenes request for a testimonial explanation for the "offense," manufactured the scenario to be related to the grand jury.

7. The reality of the pending grand jury presentation, neither foreseen nor contemplated by the investigators and not appreciated or realized by the Second Circuit, had given rise to a serious deliberative process

which the United States Attorney, in view of his respect for the sanctity of that body, felt obliged to undertake. It was only after deciding that he had a public duty to ascertain the truth of the allegations concerning the chief of the Queens County District Attorney's Indictment bureau that he opted to proceed.

8. Likewise not pointed out by Judge Friendly was the fact that the federal agent (as "Barone") was carefully instructed by his superiors that the only story to be given to the grand jurors was that created by the defendants themselves, and that under no circumstances was a recording or transmitting device to be utilized during the presentation.

9. As was only later observed by the *Archer* court, and although neither his approval nor disapproval was solicited, the U.S. Attorney had seen fit to personally inform former Chief Judge Stanley Fuld as to the fact of the plan—clearly not indicative of a cavalier attitude to the sensitivity of the undertaking.

It follows that no question is raised by the petitions which prior decisions of this court have not adequately treated in a manner consistent with the courts of New York in this case. As a consequence, the applications are unmeritorious, the case not being in need of further review. See Rules of the Supreme Court of the United States, Rule 17.1[c].

III

Petitioners' state indictment was not unnecessarily delayed.

It is petitioners' final suggestion that the original investigation was a joint federal/state undertaking and that the state indictment was first filed almost a year after their convictions and about six and a half months after the

United States Court of Appeals threw out their case. They argue therefore that their defense suffered from the denial of a speedy trial, or alternatively from extensive pre-indictment delay, citing in his latter regard, among other cases, *United States* v. *Marion,* 404 U.S. 307 (1971) and *United States* v. *Lovasco,* 431 U.S. 783 (1977). Petitioners are wrong, both as to the nature of the investigation herein and their computation of time with regard to any pre-indictment delay before the state grand jury returned a true bill. As such they raise no claim meriting review.

Indisputably, it was the finding of the trial court, which gave careful consideration to petitioner Archer's arguments, that this was not a joint federal/state undertaking but simply a federal investigation conducted at the behest of the Knapp Commission, albeit with local cooperation in the form of the Police Commissioner and his subordinate. The arrest herein was thus simply a federal matter with the state proceedings not having been even contemplated at the time.

The focal point of discussion, therefore, should be that period leading up to November of 1973, the time when the state indictment was first filed.*

Concerning this single issue of pre-indictment delay, a concept essentially predicated on the dictates of due process, this court has, for the most part, addressed itself to the

* Importantly, at the time of the federal indictment, there was no state prosecutor with jurisdiction over Queens County who could even have handled a prosecution, the Special Prosecutor's office not yet having been created and the Queens County District Attorney, aside from being in a conflict situation, himself having been under investigation. Petitioners moreover have never made any showing of facts that would have countered the trial court's assessment as to the federal nature of the investigation.

question of the extent of the appropriate statute of limitations and whether any prejudice has inured to the ability of the defendant to properly answer the charges (see *Marion, supra; Lovasco, supra*). Even so, however, a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense (*United States* v. *Lovasco, supra*).

In the matter at hand, any delay cognizable is clearly attributable to such a good faith motivation.

As seen, the federal indictment was filed in or about July of 1972. At that time no state agency with jurisdiction over the substantive offenses in Queens County was capable of prosecuting petitioners. Thereafter, petitioners went to trial in federal court and were convicted in or about January of 1973. Importantly, from that point when jeopardy attached in the federal trial, i.e., after the swearing of the jury (*Crist* v. *Bretz,* 437 U.S. 28 [1978]), no state prosecutorial agency, even were any available and so disposed, could have properly prosecuted the matter in view of the "same transaction" rule which prevails in New York (New York Criminal Procedure Law §40.20[2] [McKinney, 1971]). This was absolutely the case until that time when the United States Court of Appeals determined that the convictions had to be aside for the single reason of ". . . insufficiency of evidence to establish some element of [the federal offense] which is not an element . . ." of the state offense with which petitioners were ultimately charged (New York Criminal Procedure Law §40.20[2][f] [McKinney, 1971]). That did not occur until July 12, 1973.

Furthermore, from that point there was not a six and a half month hiatus until the subsequent state indictment as petitioners suggest—as innocuous as that itself would have been—but only a two-month lapse of time. This is because subsequent to the Circuit Court's original decision, a motion for re-argument was interposed by the United States Attorney. The Court did not decide that application until September 26. It follows that the only period of time of any consequence is that space from September 26 until the filing of the state charges in November, 1973.

Surely, no prejudice inured to petitioners during this two-month interval (*Marion, supra; Lovasco, supra*). Indeed, as observed by the trial court, petitioner Archer had already prepared for a defense—that offered at the federal trial—and thus could not have been hampered in mapping plans for a second.

Petitioner Archer's complaint that he was "lulled into a false sense of security by the fact that he was never indicted by the state authorities until after his dismissal in the United States Court of Appeals . . ." (Petition at P. 53), is thus simply belied by the controlling considerations enumerated above. Even if so, however—which we would dispute— it is inconsequential for purposes of due process. No real prejudice having resulted in a two-month delay—which itself is undoubtedly self-explanatory since the state was certainly entitled to prepare its grand jury presentation—petitioners' rights were in way compromised.

Accordingly, here again, no cognizable issue is presented that warrants the granting of certiorari.

Conclusion

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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